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No. 83-233

In the Supreme Court of the United States

OCTOBER TERM, 1983

COLORADO RIVER INDIAN TRIBES, PETITIONER

v.

GERALD ARANSON, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. The Colorado River Indian Reservation was originally established by the Act of Mar. 3, 1865, ch. 127, 13 Stat. 541. This Act set aside for the Indians of the Colorado River "all that part of the public domain in the Territory of Arizona, lying west of a direct line from Half-Way Bend to Corner Rock on the Colorado River * * *" (Act of Mar. 3, 1865, ch. 127, 13 Stat. 559). An Executive Order of Nov. 22, 1873, added another portion of the Arizona Territory to the Reservation, describing the added portion as "bounded on the west by the Colorado River, and east by mountains and mesas." 1 Kappler, *Indian Affairs* 803 (1904). The Executive Order of Nov. 16, 1874, extended the reservation for the first time into California. *Ibid.* The southwestern boundary of the Reservation was described in this order as a line running from Riverside Mountain in California, " in a southeasterly direction to the point of

beginning," which was a point on the east bank of the river about four miles above Ehrenberg, Arizona. The description of the western boundary was clarified by an Executive Order issued on May 15, 1876, so that the boundary would run from Riverside Mountain " in a direct line toward the place of beginning to the west bank of the Colorado River; thence down said west bank to a point opposite the place of beginning; thence to the place of beginning." *Id.* at 803-804.

This litigation involves approximately 1,912 acres of land along the western boundary of the Reservation. Between 1912 and 1919, the Colorado River in this portion of the Reservation slowly moved in a westerly direction until it formed a large loop (Pet. Supp. App. A58). In 1920, the Palo Verde Mutual Water Company constructed a cut-off channel across the neck of the loop (*id.* at A59). By 1921, the entire river was flowing through the cut-off, and thereafter the river never returned to its former channel (*ibid.*).

2. In 1972, the United States, as trustee for petitioners, brought this action in the United States District Court for the Central District of California to quiet title to the 1,912 acres lying between the left bank of the present day Colorado River and the center line of the channel of the river as it existed immediately prior to the avulsive change in the channel that occurred in 1920. The United States alleged that this land was part of the Colorado River Indian Reservation, and it sought to eject and recover damages from the respondent non-Indian farmers who were in possession.

After a trial, the district court found that the Executive Order of May 15, 1876, purported to include within the Reservation the entire bed of the Colorado River (Pet. Supp. App. A57). Because California had obtained title to the western half of the riverbed upon its admission to the Union in 1850, however, the Executive Order was found effective to reserve only the eastern half of the bed to the petitioners (*ibid.*).

The district court also found that the portion of the Colorado River bed in question had moved in a westerly direction until 1919 by a process of erosion and accretion and that the cutting of the channel in 1920 had caused an avulsive change in the course of the river (Pet. App. A58-A59). Thus, the land to the east of the median line of the original river bed still belonged to the Reservation, and the non-Indians who had entered onto the land in the 1930's and who had farmed it since then were wrongful occupiers (*id.* at A60). Title to the western half of the pre-1920 riverbed was awarded to California; title to the eastern half of the bed and the land between that bed and the present river was awarded to the United States in trust for petitioner (*ibid.*). The United States was also awarded damages against some of the landowners for the fair rental value of the lands (*id.* at A61).

The landowners appealed, contending that the district court erroneously applied federal, rather than state, law to the accretion/avulsion issue and that it had erred in its determination of the riverbed ownership issue. The court of appeals issued an opinion on March 30, 1981, affirming the district court's judgment (Pet. App. A1-A24). The court held that, while California law should have provided the rule of decision on the accretion/avulsion issue, state law would not have led to a different result than the federal law applied by the district court (Pet. App. A5-A9). Unaware of this Court's decision six days earlier in *Montana* v. *United States*, 450 U.S. 544 (1981), the court upheld the vesting of the eastern half of the riverbed in the United States in light of the language of the relevant executive orders (*id.* at A9-A18). Judge Sneed dissented from the holding on ownership of the riverbed (*id.* at A18-A24).

On April 17, 1981, the court of appeals withdrew its opinion and requested further briefing concerning the impact of the *Montana* decision. Shortly thereafter,

petitioners and the State of Arizona intervened. Petitioners in their brief claimed rights to the former riverbed based upon aboriginal use and occupancy, an argument not previously raised by the United States.

3. The court of appeals issued a new decision on January 10, 1983. The court retained that portion of its previous opinion that had addressed the accretion/avulsion issue (Pet. App. A25-A42), but it held that *Montana* compelled rejection of petitioners' claim to the eastern half of the riverbed. The court explained that the relevant executive orders were not sufficiently specific to convey the bed of the river under the standards set forth in *Montana* (*id.* at A44-A45). The court added that, regardless of the specificity of the conveyance documents, an intent to convey the riverbed could be implied where there is a showing that the Indians depended heavily on the particular body of water (*id.* at A46-A48), citing *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918). In this case, however, the Court concluded that the record did not show "that the Indians were so dependent on the river that Congress would have intended to depart from the equal footing doctrine and convey the river bed" (Pet. App. A48). The court of appeals therefore remanded the case to the district court with instructions to determine "the correct boundary of the Reservation" and to determine the issue of aboriginal title that had been raised by petitioner for the first time on appeal (*id.* at A49).

4. This petition addresses two of the grounds under which petitioners claim that they are entitled to the inclusion of the eastern half of the Colorado River bed in the Reservation. A third ground, petitioners' claim of aboriginal title, has not yet been considered by any court, and the district court has been directed to consider it on remand. If the Tribes succeed in establishing aborignal title, they will receive the full measure of relief presently denied to them by

the decision below, and further review of the questions presented here would be superfluous. Moreover, the court of appeals also left to the district court on remand the determination of the exact boundary of the Reservation, which requires a determination of the width of the river at the time of the conveyance to petitioners. Because even under the decision below, petitioner retains title to lands located east of the former riverbed, resolution of this issue will clarify the extent to which the court of appeals' ruling on the questions presented here affects the size of the Reservation.

In light of the existence of these significant unresolved issues, granting certiorari at this interlocutory stage would be a departure from the normal practice of this Court. See, *e.g.*, *Brotherhood of Locomotive Firemen & Enginemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967). The issues presented here, as well as the issues to be determined on remand, will all be available for review by this Court when a final judgment has been entered disposing of all of the issues in the case. See *Hamilton-Brown Shoe Co.* v. *Wolf Brothers & Co.*, 240 U.S. 251, 257-259 (1916).

The court of appeals held that the relevant statute and executive orders conveying the Reservation to petitioners did not convey the riverbed with sufficient specificity to satisfy the standards of *Montana* v. *United States*, 450 U.S. 544 (1981). Petitioners contend (Pet. 7-8), that the 1876 executive order involved here, in specifying the boundary of the Reservation as the *western* shore of the river, is sufficiently specific to meet the standards of *Montana*. The court of appeals also held that the Colorado River Indians were not so dependent on the river as to warrant a finding that Congress must have intended to convey the riverbed. Cf. *Alaska Pacific Fisheries* v. *United States*, 248 U.S. 78 (1918). But petitioners dispute this finding based on the

Indians' use of the river for fishing and agricultural purposes. See Pet. 9-16. On each point, there are arguably relevant differences that distinguish the present case from *Montana*. Essentially, the issues presented here are fact-bound, and their proper resolution depends upon the particular background of these Tribes and the language of the conveyance documents involved.

The case therefore does not appear to present any issue of sufficiently general importance to warrant a departure from the Court's customary practice of denying review at an interlocutory stage.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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